

After reviewing the record and considering the briefs and arguments of the parties, the Appeals Board finds:

The Award of the Administrative Law Judge should be affirmed.

The Award of the Administrative Law Judge sets out his findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. Having reviewed the entire record, the Appeals Board finds the findings and conclusions, as enumerated in the Award of the Administrative Law Judge, to be accurate and appropriate and adopts same as its own findings as if specifically set forth herein.

The Appeals Board adopts the analysis of the evidence by the Administrative Law Judge regarding the liability of the Workers Compensation Fund. Specifically, the Appeals Board agrees with the finding that the respondent has failed to meet its burden of proof that it knowingly employed or retained a handicapped employee. It is not disputed in the record that the employer was unaware of any back problems that claimant may have experienced prior to his date of hire. Thereafter, the employer did become aware that claimant received some type of treatment for back pain prior to September 4, 1992. Claimant testified that he had received treatment from a Swedish masseuse. In addition, respondent points to the fact that claimant would on occasion wear some type of back support or carpenter's apron with a wide belt. There is some indication that respondent may have attempted to accommodate claimant on occasion with regard to heavy lifting. However, the respondent's representative testified that before his September 4, 1992 accident claimant did perform all manner of heavy manual labor, including the concrete and framing work which ultimately caused respondent to terminate claimant from its employment on February 19, 1993. Claimant testified that he did not consider himself to be a handicapped worker prior to September 4, 1992 and had observed no lifting restrictions prior to that date.

The purpose of the Kansas Workers Compensation Fund is to encourage the employment of persons handicapped as a result of mental or physical impairments by relieving employers, wholly or partially, of workers compensation liability resulting from compensable accidents suffered by these employees. *Morgan v. Inter-Collegiate Press*, 4 Kan. App. 2d 319, 606 P.2d 479 (1980); *Blevins v. Buildex, Inc.*, 219 Kan. 485, 487, 548 P.2d 765 (1976).

K.S.A. 44-566(b) provides:

"'Handicapped employee' means one afflicted with or subject to any physical or mental impairment, or both, whether congenital or due to an injury or disease of such character the impairment constitutes a handicap in obtaining employment or would constitute a handicap in obtaining reemployment if the employee should become unemployed and the handicap is due to any of the following diseases or conditions: . . .

"15. Loss of or partial loss of the use of any member of the body;

"16. Any physical deformity or abnormality;

"17. Any other physical impairment, disorder or disease, physical or mental, which is established as constituting a handicap in obtaining or in retaining employment."

An employer is wholly relieved of liability when the handicapped employee is injured or disabled or dies as a result of an injury and the injury, disability or the death probably or most likely would not have occurred but for the preexisting physical or mental impairment. See K.S.A. 1992 Supp. 44-567(a)(1).

An employer is partially relieved of liability when the handicapped employee is injured or is disabled or dies as a result of an injury and the injury probably or most likely would have been sustained without regard to the preexisting impairment but the resulting disability or death was contributed to by the preexisting impairment. See K.S.A. 1992 Supp. 44-567(a)(2).

In either situation, it is the employer's responsibility and burden to show it hired or retained the handicapped employee after acquiring knowledge of the preexisting impairment. K.S.A. 1992 Supp. 44-567(b) provides:

"In order to be relieved of liability under this section, the employer must prove either the employer had knowledge of the preexisting impairment at the time the employer employed the handicapped employee or the employer retained the handicapped employee in employment after acquiring such knowledge. The employer's knowledge of the preexisting impairment may be established by any evidence sufficient to maintain the employer's burden of proof with regard thereto."

An employee, previously injured or handicapped, is not required to exhibit continued disability or to be unable to return to his former job in order to be a "handicapped" employee. Ramirez v. Rockwell Int'l, 10 Kan. App. 2d 403, 405, 701 P.2d 336 (1985). Further, mental reservation on the part of the employer is not required. See Denton v. Sunflower Electric Co-op, 12 Kan. App. 2d 262, 740 P.2d 98 (1987), Aff'd 242 Kan. 430, 748 P.2d 420 (1988).

The provisions imposing liability upon the Kansas Workers Compensation Fund are to be liberally construed to carry out the legislative intent of encouraging employment of handicapped employees. Morgan v. Inter-Collegiate Press, *supra*.

As indicated above, the Legislature created the Workers Compensation Fund for the basic and primary purpose of encouraging the employment of impaired individuals. Assessing liability against the Fund in situations where that primary purpose is not furthered is improper.

The Administrative Law Judge found that the respondent failed to meet its burden of proof on the basis of knowledge of handicap. The Appeals Board finds from the record taken as a whole that the Award of the Administrative Law Judge should be affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge George R. Robertson dated November 30, 1994 should be, and hereby is, affirmed in all respects and the orders contained in the Award are hereby adopted by the Appeals Board as its own.

IT IS SO ORDERED.

Dated this ____ day of March 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jerry M. Ward, Great Bend, KS
Kent Roth, Great Bend, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director